

BRIEF FOR PETITIONER
SOUTHWESTERN CABLE CO.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Case No. 21,183 ✓

SOUTHWESTERN CABLE CO.,

v.

Petitioner,

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

Case No. 21,192

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and
TRANS-VIDEO CORP.,

v.

Petitioners,

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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**BRIEF FOR PETITIONER
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JURISDICTIONAL STATEMENT

Jurisdiction is founded on the provisions of Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), and Section 2 and 3 of the Judicial Review Act of 1950, as amended, 5 U.S.C. Sections 1032 and 1033. The venue of this proceeding is placed in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 3 of the Judicial Review Act of 1950, 5 U.S.C. 1033.

The Order which this Court is here asked to review and set aside was issued by the Federal Communications Commission (herein "Commission") on July 25, 1966, as corrected by Erratum released July 26, 1966 in proceedings before it styled Midwest Television, Inc. (KFMB-TV), Petitioner, and Southwestern Cable Co., *et al.*, Respondents, FCC Docket No. 16786. (R. 577-595, 596-598) That Order, *inter alia*, granted the request of Midwest Television, Inc. for "temporary relief" and, without any opportunity for prior hearing, directed Petitioner to confine delivery of Los Angeles television signals over its community antenna television system only to those subscribers within geographic areas served on February 15, 1966 and to persons who began receiving service, or who had accepted service prior to the date of the Commission's Order.

The Commission order further provided that such "temporary relief" shall not become effective until judicial determination of the motion for a stay in the case of any respondent which seeks judicial review and a judicial stay within fourteen days of the Order. Such motion was timely filed by the Petitioner; and this Court on August 23, 1966, issued and interlocutory injunction staying the effectiveness of the above described Order, pending disposition of this Review proceeding.

STATEMENT OF THE CASE

Petitioner operates a community antenna television (CATV) system pursuant to a 30 year franchise issued by the City of San Diego and which became effective October 30, 1964.¹ This franchise granted Petitioner the right to operate a CATV system within the corporate limits of San Diego in an area lying north of the San Diego River channel. By unanimous vote, the San Diego City Council declared the proposed CATV service to be in the ". . . best interest of San Diego and its inhabitants". Pursuant to this franchise, Southwestern promptly undertook construction of a CATV system and commenced service to subscribers on December 22, 1965. As of February 15, 1966, the system consisted of approximately 45 miles of plant with approximately 350 subscribers who were provided with the signals of the local San Diego television stations and Los Angeles television stations.

During the time of this construction, the Commission exercised no authority over CATV systems, which, like Petitioner received television signals by off-the-air pickup. The Commission's relationship to CATV was indirect and was limited to systems which depended upon microwave facilities.

¹ CATV systems are generally located in areas where reception of television signals is not feasible or is unsatisfactory because of terrain, weather, or because the area is too far from a television station. In such area, a community antenna is erected on a mountain or other high elevation where the reception of the desired stations is strong and clear. From such central location ("head-end" site) the CATV system distributes television signals by wire to homes of the viewing public who subscribe and who are usually required to pay an installation charge and a fixed monthly fee.

In the case of San Diego, the essential effect of CATV is not merely to solve reception problems stemming from terrain, distance and weather but also to enable San Diegans, who now receive programs on only two VHF television stations to secure as wide a choice of television programs, news, documentaries, sports information, educational programming, and entertainment as their neighbors a few miles to the north in Orange County and Los Angeles, where seven VHF television stations are allocated.

It was not until March 8, 1966, with the release of the Second Report and Order² that the Commission purported to assert regulatory authority over CATV systems of the type constructed and operated by Petitioner.³

In essence, that Report and Order and the rules adopted therein regulated and limited the operation of CATV systems in three major respects. First, the "carriage" rules provide that CATV systems are required to carry the signals of local and nearby television stations. Second, the "exclusivity" rules provide that a television station with a stronger signal over the CATV community could prevent the system from carrying on the same day the signal of another station with a weaker signal which duplicates its programs.⁴ Third, the "Top 100 Market" rule provides that in the markets so designated by American Research Bureau, a private organization engaged in market research and television ratings, CATV systems could not carry television broadcast stations which did not place a signal of Grade B strength over the community serviced by the CATV system, unless authorized by the Commission.

² *Second Report and Order*, Dockets 14895, 15233, 15971 (released March 8, 1966), published in 31 Fed. Reg. 4540.

³ At the same time that the Commission asserted that it had such jurisdiction it noted that — "We stated in the notice (par. 31) that we would welcome (i) a Congressional guidance as to policy and (ii) Congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. In this report, we stress again the desirability in our view of congressional guidance in this important area. But thus far the congressional guidance has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining policy guidance in the CATV field." (*Ibid.* Paragraph 21 at 4543.)

⁴ The Commission rules governing television broadcast stations recognize three grades of signal strength — Principal City Grade, Grade A and Grade B. These grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade - 90%; Grade A - 70%; Grade B - 50%.

The "Top 100 Market" rule was announced by a Commission press release on February 15, 1966, and purported to become effective on that date, despite the fact the rules were not adopted until March 4, 1966, were not released to the public until March 8, 1966, and were not published in the Federal Register until March 17, 1966. It is noted further that the statement of the rules as announced in the press release differed materially from the provisions of the rules as subsequently published.

The Commission's asserted authority did not include a claim of power to license the operation of CATV systems. On the contrary the Commission has uniformly recognized that the licensing of CATV systems is the proper function of local authorities.

On March 17, 1966, Midwest Television, Inc., licensee of KFMB-TV, San Diego, California, filed a petition with the Commission and on April 4, 1966, filed a supplement thereto, pursuant to the provisions of Sections 74.1107 and 74.1109⁵ of the Commission's Rules requesting that the Commission (1) grant Midwest immediate temporary relief by directing Southwestern and other CATV systems operating in the area "*. . . to cease and desist* from delivering Los Angeles signals beyond the boundaries of the geographical areas in which it was operating on February 15, 1966 . . ." (emphasis added); and (2) grant Midwest permanent relief based upon the pleadings, or after hearing if one be deemed necessary, confining carriage of Los Angeles signals by such CATV systems. (R. 1-21, 121-137)⁶ Petitioner filed responsive pleadings to the Midwest petitions which requested, in the alternative, that the Commission deny or dismiss the Midwest petitions. (R. 265-328; 330-362; 377-384; 518-

⁵ F.C.C. Reg. § 74.1107, 31 Fed. Reg. 4572 (1966). F.C.C. Reg. § 74.1109, 31 Fed. Reg. 4572 (1966).

⁶ References are to the page numbers of the Record as certified to this Court by the Commission under date of August 26, 1966.

557) In addition, Petitioner filed a Statement of Position which set forth its view of the legal questions presented. (R. 363-376)⁷

On May 31, 1966, a petition was filed with the Commission which pointed out that in another pending case (Docket No. 16575) before it, testimony of an expert witness of the Commission established that the Grade B contours of all the Los Angeles VHF stations fell within the city limits of San Diego. The petition was filed by Mission Cable TV Inc. and the operators of other CATV systems, Petitioners in this Court in Case No. 21192, and was entitled "Supplement to 'Opposition to Petition and Supplement to Petition for Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV systems carrying Signals of Los Angeles Stations into the San Diego Area'." On June 3, 1966, the Commission returned the pleading with a letter advising that it would take official notice of the matter.

On July 25, 1966, the Commission issued its Memorandum Opinion and Order under review herein (R. 577-595). The Commission held that a hearing was required in view of substantial public interest questions and "... the number of unresolved issues present." Although the Commission had previously stated that it would take official notice of the testimony of its own expert, it did not even advert to this evidence but instead stated that "... There is controversy as to whether some of the

⁷ Southwestern contended that the restrictions and limitations imposed on CATV by the Commission's Rules were illegal for the reason that:

"(1) The Commission lacks statutory authority.

"(2) They constitute an unconstitutional infringement on freedom of speech.

"(3) They constitute the taking of property without due process of law.

"(4) They do not comply with required statutory procedures.

"(5) They are based upon standards which are arbitrary and capricious."

respondents' systems operate within the Grade B contour of some of the Los Angeles stations . . .".⁸

With respect to the request for temporary relief, the Commission concluded that such relief ". . . is necessary and appropriate 'before consequences *possibly adverse* to the public may develop'." (Emphasis added.) (Memorandum Opinion and Order, Paragraph 20; R. 589.) In response to the contention that issuance of a Cease and Desist Order could not be issued peremptorily as requested by Midwest, but rather required observance of the specified notice and hearing provisions of Section 312 of the Communications Act, the Commission concluded that the broad mandate of the Communications Act dispenses with the need for explicit statutory authority. (Memorandum Opinion and Order, Paragraph 21, R. 590)

In response to Southwestern's contentions that the Commission's Rules were illegal, the Commission, in a footnote, stated only:

"Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order."
(Memorandum Opinion and Order, Page 7, Footnote 8; R. 583)⁹

Finally, the Commission ordered that the proceedings be designated for hearing at a time and place to be specified in a further order upon nine stated issues. The Commission granted the request of Midwest for "temporary relief" and with respect to Southwestern directed it to confine delivery of the Los Angeles signals carried on its system to subscribers within areas served on February 15, 1966, and to persons who

⁸ The Commission also concluded "We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on these matters." (Memorandum Opinion and Order, Paragraph 18; R. 588.)

⁹ No action has been taken to date on this Statement of Position.

began receiving service or who had accepted service prior to the date of the Commission's Order.

The stay which was issued by the Commission was not based on any finding or judgment that Petitioner was in violation of any Commission rule or applicable provision of the law. On the contrary, it was conceded that Petitioner was in full compliance with all such regulations and laws. The Commission order was premised on the assumption that "... as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations..." (Memorandum Opinion and Order, Paragraph 19, R. 589).

The so-called "temporary action" which was issued by the Commission was not circumscribed by any specific time period; rather it was to be effective pending the outcome of the entire proceeding before the Commission. (R. 594) Such action necessarily includes a hearing before an Examiner, proposed findings, an initial decision, exceptions and review by the Review Board, a petition for review by the full Commission, and action on any subsequent petitions for reconsideration, which are customarily filed in proceedings of this nature.

The Commission action was issued notwithstanding uncontroverted evidence that Petitioner would be faced with insolvency as a result thereof. (R. 352-354, 555)

On August 10, 1966, this Court issued a stay of the Commission's "temporary relief". The respondents filed a motion for reconsideration, and oral argument was held on said motion on August 22, 1966. This Court, on August 23, 1966, issued an interlocutory injunction against that portion of the Commission's Order which would have required Petitioner to desist from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966. The Court noted *inter alia* in issuing this interlocutory injunction that Petitioner would suffer irreparable damage if the injunction was not issued. Further, this Court noted expressly that

the Government had conceded that Petitioner was not in violation of the governing statutes and rules.

Comparable injunctions were issued against similar Commission Orders affecting Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp. whose cases have been consolidated with the subject Petitioner's case by Order of this Court filed August 23, 1966.

QUESTION PRESENTED

The question presented which will be argued in detail in this Brief is as follows:

Whether the Commission's restraint, without hearing, of Petitioner's admittedly lawful operation of a community antenna television system, constitutes an illegal restraint, issued without statutory authority, and in violation of Petitioner's statutory rights.

SPECIFICATION OF ERROR ¹⁰

The Commission's restraint, without hearing, of Petitioner's admittedly lawful operations of transmitting intelligence and communications to the public by a community antenna television system constitutes an illegal restraint, issued without statutory authority, and in violation of Petitioner's statutory rights.

SUMMARY OF ARGUMENT

The Commission is without statutory power to grant temporary relief and to stay respondents' lawful operations without a hearing. The Commission was created by an Act of Congress and it has no powers

¹⁰ For the convenience of this Court, Petitioner herein shall argue the error specified herein which is fully dispositive of the issues in this case. Petitioner shall incorporate by reference and adopt as its own the arguments advanced in support of the remaining specifications of error by Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp. in the Brief to be filed in Case No. 21,192.

except the powers granted therein. The Commission concedes that the Act contains no provision expressly empowering it to issue a cease and desist order without a hearing. Indeed, the only provision in the Act (Section 312) which deals with cease and desist orders expressly provides that there *must* be a hearing before such an order can be issued.

In response to the clear mandate of Section 312, the Commission makes this extraordinary argument: Section 312 applies only to *unlawful* activity, in which case a hearing would be required. But Petitioner is not engaged in any unlawful activity. Therefore, in the Commission's view, Section 312 is inapplicable and it can issue a stay against Petitioner without a hearing.

Congress intended no such preposterous result. It could envision the need for cease and desist orders where rules or regulations were being violated, but it wrote in the safeguard of the hearing requirement. It is apparent that Congress did not envision a need for cease and desist orders against lawful activity, so the Communications Act is simply silent on this subject.

The Commission endeavors to replace this statutory silence by a reference to Section 4(i) of the Communications Act but this reference is patently in error. 47 U.S.C. § 154(i). Section 4(i) expressly relates only to acts, rules, and orders of the Commission which are "not inconsistent with this Act." Inasmuch as the Act expressly requires a *hearing* for a cease and desist order when the action involved is *unlawful*, it is absurd to contend that it is not inconsistent with the Act to grant a cease and desist order against *lawful* activity *without a hearing*.

Such an order in the instant case simply means that for an indeterminate period of time the residents of San Diego will be deprived of a full variety of television choice and diversified programs of entertainment, news, political broadcasts and educational material — all of which would be provided by Petitioner's CATV system operating in full compliance with the Commission's substantive rules.

ARGUMENT

I

The Commission's Restraint, Without Hearing, of Petitioner's Admittedly Lawful Operations of Transmitting Intelligence and Communications to the Public by a Community Antenna Television System Constitutes an Illegal Restraint, Issued Without Statutory Authority, and in Violation of Petitioner's Statutory Rights.

A. Nature of the Commission's Action

The Commission has committed patent and egregious error in issuing a peremptory stay, without hearing, of Petitioner's lawful activities. This is manifest in the Commission's attempt to obscure the nature of the action taken by it. On the one hand, the Commission explicitly noted that it had been requested to order Petitioner to ". . . cease and desist . . ." (Memorandum Opinion and Order, Paragraph 1; R. 578). In subsequent pages of its Opinion, the Commission then speaks in terms of a ". . . grant [of] temporary relief, pending final disposition of this proceeding . . ." (Memorandum Opinion and Order, Paragraph 24; R. 592). It is Southwestern's view that such semantic differences are irrelevant niceties; that a "stop order," whether it be termed "cease and desist" or "temporary relief," produces precisely the same result. Irrespective of how the Order is labeled, it is obvious that it is a sanction which requires Petitioner to cease and desist from continuing its normal activities which are perfectly legal. The Commission's linguistic gymnastics are understandable in the context of the applicable governing statute. The Commission was forced to engage in this verbal cover-up, for if its action is regarded as a cease and desist order — which it plainly is — then the Commission has violated the specific procedural requirements of Section 312(b) and (c) of the Communications Act, 47 U.S.C. §§ 312(b) and (c). (See Appendix hereto.)

*B. Provisions of Section 312 of Act
and Commission Rules*

Section 312(b) and (c) of the Communications Act provide explicit and unequivocal requirements for the issuance of a cease and desist order, including notice and the prior right to be heard in an evidentiary hearing. In the issuance of its order in this case, the Commission failed to comply with a single one of the foregoing absolute requirements of the Act. Instead, it proceeded upon the petition of an interested party only. It did not serve an order to show cause. It did not afford to the other parties an opportunity to be heard or present evidence upon appropriate notice.

Further, the Commission's departure in this instant case from these established statutory standards is made even more incomprehensible by reference to the Commission's own Rules and Regulations and its practices thereunder. It is completely clear that in adopting the Rules and Regulations involved herein, the Commission itself did not contemplate such a peremptory procedure in direct violation of the requirements of Section 312 of the Communications Act.

Section 74.1107 as adopted by the Second Report and Order provided, in part, that —

"In the event an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and if so the nature of such relief . . ." (*op. cit. supra*, note 5)¹¹

¹¹ By Memorandum Opinion and Order, released April 21, 1966, 3 F.C.C.2d 400, 7 Pike & Fischer R.R.2d 1570, the Commission "clarified" the procedural aspects of Section 74.1107(d) by amending the last sentence of Section 74.1107(d) to delete reference to evidentiary hearing. The sentence as amended provides:

"The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in

In explaining the procedures contemplated to implement the provisions of this section, the Commission stated:

"... enforcement will be through the cease and desist procedures set forth in Section 312(b) and (c) or pursuant to Section 502 of the Act and will not include other sanctions applicable to licensees." (Second Report and Order, Paragraph 101, *op. cit. supra*, note 2 at 4556)

C. Prior Commission Rulings

In a number of actions taken by the Commission subsequent to the Second Report and Order looking toward the implementation of the rules adopted therein, the Commission, with one exception discussed below, consistently followed the required procedures of Section 312 of the Communications Act, and afforded the respondents a hearing to determine whether or not a stay should issue. *Mission Cable TV, Inc. and Trans-Video Corp.*, 3 F.C.C.2d 296, 7 Pike & Fischer R.R.2d 419 (1966); *Buckeye Cablevision*, 7 Pike & Fischer R.R.2d 26 (1966); *Muskegon Television System and Booth Communication Co.*, 3 F.C.C.2d 713, 7 Pike & Fischer R.R.2d 415 (1966).

Each of these cases involved attempts by CATV systems, in contravention of the provisions of Section 74.1107 of the rules, to extend the signals of television stations beyond their predicted Grade B contours.

the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief."

The amendment was adopted during the pendency of this case before the Commission and three days after the filing of Southwestern's pleadings in response to the Midwest petition. The amendment on its face is not addressed to the requirements of Section 312. In any event, for the reasons stated herein, the Commission cannot evade the explicit statutory requirements by a "clarifying" procedural change in its own rules. (See Appendix hereto for statement of applicable Commission rules.)

In each case, the Commission sought to restrain such extensions by the issuance of an order pursuant to the provisions of Section 312 of the Communications Act directing such systems to show cause why they should not cease and desist from such extensions of service. Such cases differ from the case under review herein in only one material respect. In the case under review, the Commission has not found that Petitioner's operations are in violation of Section 74.1107 of its rules. On the contrary, its order is premised on the assumption "...as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations . . ." ¹² (Memorandum Opinion and Order, Paragraph 19, R. 589). Moreover, this Court in its issuance of its temporary injunction has expressly found that "... respondent Commission conceded that none of the Petitioners are presently in violation of the governing statutes and Commission rules . . .".

The Commission's action herein therefore presents the anomalous — and indeed absurd result — that systems operating in violation of the Commission's rules are entitled to, and in fact do receive, the protection and enjoy the safeguards of the hearing requirements of Section 312,

¹² In view of this assumption (which, in fact, had been established) the stay order issued by the Commission is grossly arbitrary and capricious. For, in a proceeding involving the identical question in the neighboring community of Poway, the Commission reached the exact opposite result and held:

"In view of our finding, it follows that if any portion of the cable system operates within the Grade B contour of any station, the signal of that station may be carried to subscribers throughout the system."

* * *

"Since some portion of the CATV system lies within the Grade B contour of each of the aforementioned television stations, no violation of Section 74.1107 has been established because of carriage of these on the CATV system." *Mission Cable TV, Inc. and Trans-Video Corp.*, 4 F.C.C.2d 236, 7 Pike & Fischer R.R.2d 631 (1966). The same result was reached in *Buckeye Cablevision, Inc.*, 3 F.C.C.2d 798, 7 Pike & Fischer R.R.2d 423 (1966).

whereas a system which does not violate the rules but conforms to such rules is not entitled to a hearing and is subject to a peremptory stay order. Such arbitrary administrative action has never been countenanced by the judiciary.

As recently as September 16, 1966, a long-established judicial principle was invoked by the United States Court of Appeals for the District of Columbia Circuit which issued a stay *pendente lite* of the Commission's cease and desist order which had been issued against a community antenna television system proposing the importation of signals from four television stations in Milwaukee and one in Chicago. *Booth American Company v. FCC*, No. 20,367. In issuing the stay, the Court stated first that irreparable injury flows from the termination or suspension of operations which were commenced when lawful. Of decisional significance to the subject proceeding, the Court then stated "We think the cease and desist order must rest on a generally valid basis for stopping the operations of a CATV system, set forth expressly or implicitly in the Commission's rules."

As noted above, in one other case, *Courier Cable Co., Inc.*, 7 Pike & Fischer R.R.2d 372 (1966), the Commission did not comply with the hearing provisions of Section 312 but issued a stay in the form of "interim relief." That case, however, unlike the case involved herein, involved an extension of Grade B signals in violation of Section 74.1107 of the Commission's Rules. The Commission's decision in that case explicitly noted, however, that —

"... the relief afforded here will be for a short period of time. Responsive pleadings are due to the petition for permanent relief within approximately three weeks and we expect to expedite our consideration of this matter. If, upon review of all of the information then before us, it is determined that a hearing is necessary, the interim relief here afforded can then be appropriately modified pending the outcome of the hearing." (7 Pike & Fischer R.R.2d at 372)

In the case herein, no finding was made by the Commission that the stay ". . . will be for a short period of time." On the contrary, the stay imposed herein is issued pending the outcome of a hearing ordered by the Commission ". . . at a time and place to be specified in a further order . . ." By subsequent order of the Hearing Examiner (September 12, 1966), the hearing has been scheduled to convene on December 6, 1966. In light of the number and complexity of the hearing issues, it is unlikely that the hearing designated by the Commission will be concluded and a final opinion rendered for well over a year from this date. And by the terms of the Commission's action under review herein, the injunction *pendente lite* which it has issued against the lawful operation of Petitioner's CATV system will remain in effect for that extended and indefinite period.

In the light of the foregoing, it is respectfully submitted that the action taken by the Commission in the within case is nothing more than a cease and desist order issued illegally in view of the failure to comply with the applicable safeguards and provisions of Section 312 of the Communications Act.

D. Legislative History of Section 312

The Commission's attempt to avoid the substantive requirements of Section 312 by labeling its Order as involving mere "temporary relief" must fail for the simple reason that the Commission has no statutory authority to issue such relief. It is axiomatic that the Commission has no authority except as conferred upon it by statute. *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Board*, 112 U.S. App. D.C. 290; 302 F.2d 875 (1962). Prior to the adoption of Section 312 of the Communications Act, the only statutory sanction available to the Commission involved the power to revoke or refuse licenses. This limitation on the Commission's authority was recognized expressly by the Supreme Court:

". . . When to assert its undoubted power to regulate

radio channels, Congress set up the Federal Communications Commission, it prescribed licensing as the method of regulation. USCA § 307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the 'touchstone' of 'public convenience, interest, or necessity.' Since the licensee receives no rights in the channel beyond the term of its license, the Commission may grant a license to a competitor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. *Federal Communications Com. v. Sanders Bros. Radio Station*, 309 US 470, 475, 84 L ed 869, 874, 60 S Ct 693; *National Broadcasting Co. v. United States*, 319 US 190, 218, 227, 87 L ed 1344, 1363, 1368, 63 S Ct 997. These cases make clear that the Commission's regulatory powers center around the grant of licenses. *They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.*" *Regents of Georgia v. Carroll*, 338 U.S. 586, 598-599 (1950). (Emphasis supplied)¹³

In that same case, the Supreme Court noted that the Commission had been actively engaged before Congress in endeavoring to seek authority for additional sanctions but that the Commission's requests for legislative action ". . . did not go beyond asking for power to issue a cease and desist order against a licensee." (*Ibid.* at page 602)

Subsequent to the issuance of the Supreme Court's opinion in the *Carroll* case, Congress, through Section 312 of the Communications Act, granted to the Commission the power to issue cease and desist orders. However, the legislative history of Section 312 makes it abundantly clear

¹³ It is significant, in the purported regulation of CATV, that the Commission did not assert any licensing authority. On the contrary, licensing authority was disavowed and a limited regulatory authority only was asserted.

that this new sanction was limited in scope, and could be used only in certain specific instances, and then only in accordance with carefully enunciated procedural safeguards.

In the Congressional hearings on the 1952 amendments, then acting Chairman Hyde testified that "...the proposed legislation would require a show-cause type of procedure whenever the Commission would issue a cease and desist order." (*Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce*, U. S. Senate, 81st Cong., : 1st Sess., June 16, 17, 1949, page 41.) In later hearings, the Commission offered a proposed subsection (c) to Section 312 that would clearly delineate revocation and cease and desist order procedures. The Commission specifically proposed that it should serve upon the party involved an order to show cause why an order of revocation or cease and desist should not be issued. "The party would be given an opportunity to demonstrate at a hearing why no such order should be issued, and only after such a hearing would the Commission be authorized to issue an order revoking or suspending a license or *requiring a party to cease and desist from any action.*" (Emphasis added) (*Hearings before the Committee on Interstate and Foreign Commerce*, House of Representatives, 82nd Cong., 1st Sess., April, 1951, page 98, 101.) Clearly, therefore, the cease and desist sanction added to Section 312 by the Communications Act Amendments of 1952 was conceived by Congress and urged by the Commission itself only upon compliance with the prescribed procedures. It is clear, further, that Section 312 contains the sole administrative sanction available to the Commission and that the Commission has not been given any express statutory authority to issue the type of "temporary relief" it promulgated in this case, without a hearing.¹⁴

¹⁴ In fact, the only instance where the Commission can proceed, without hearing, is derived from its power to suspend tariffs as conferred by Section 204 of Title II of the Communications Act and even this power is specifically limited to a period of three months. 47 U.S.C. 204.

It is clear, too, that if Congress had wanted to grant this authority to the Commission, it knew how to make such an express statutory delegation. Congress has demonstrated this repeatedly in its highly limited and carefully conditioned grants of authority to other administrative agencies to issue temporary orders without hearing. For example, the Securities and Exchange Commission has the power summarily to suspend trading in any registered security for a period of not exceeding ninety days. 15 U.S.C. § 78 s(4). Permits issued under the Food, Drug and Cosmetic Act can be suspended as a measure necessary to protect public health but even here the permittee is entitled to seek and the Agency is adjured to hold a "prompt hearing" (21 U.S.C. § 344(b)). The Interstate Commerce Commission has the power to suspend permits on fifteen days notice (49 U.S.C. § 312(a)). The Federal Aviation Agency, as a matter of safety regulation, authorizes suspension of specifically named certificates, without hearing and in cases of emergency, but even in such critical cases, the Board must dispose of any appeal therefrom within sixty days (49 U.S.C. § 1429).

Indeed, Section 303(m)(1) and (2) of the Communications Act confers comparable and equally limited authority on the Commission. Pursuant to the authority of this section the Commission may ". . . suspend the license of any operator . . ." in specified circumstances. However, such authority is explicitly circumscribed by further requirements that such order of suspension shall not take effect until fifteen days notice in writing to the operator affording him the opportunity for a hearing upon such order. Further, it is provided that in the event such a hearing is requested ". . . said order of suspension shall be held in abeyance until the conclusion of the hearing . . . Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension."

In the light of the foregoing provisions of the Communications Act and its legislative history, it is incontrovertible that the Commission does not have authority to issue the order herein without a hearing.

E. Controlling Judicial Precedents

The same conclusion is impelled by consistently established judicial precedents. In the *Standard Airlines* case, the Court of Appeals for the District of Columbia Circuit ruled that the Civil Aeronautics Board could not lawfully suspend a letter of registration granted to an irregular air carrier, in the absence of express statutory authority for such extraordinary action. *Standard Airlines, Inc. v. Civil Aeronautics Board*, 85 U.S. App. D.C. 29; 177 F.2d 18 (1949). The Court squarely rejected the Board's contention that it could validly reserve to itself the right to suspend without hearing an irregular operation which was exempted from the normal requirements of the statute. The Court stated:

"Standard also argues that suspension of an air carrier's operating authority without a hearing is outside the authority delegated to the Board by the statute. It points to other portions of the Act which deal with suspension. Section 401(h), dealing with certificates, and Section 402(g), dealing with foreign air carrier permits, require notice and hearing before suspension. The only specific authority granted to the Board by the statute for suspension without a hearing, is conferred by Section 1005(a) and is expressly limited to emergencies affecting safety. The question, then, is whether the Board can, consistently with the statute, create another exception wherein notice and hearing are not required.

"It is true that the Board has authority, under Section 205(a) of the Act, to make rules and regulations consistent with the provisions of the Act, and authority, under Section 416(b)(1), to exempt air carriers from the requirements of the Act or regulations passed pursuant thereto. But even in respect to emergencies affecting safety, Congress deemed it necessary to say specifically that a suspension could be without hearing. If Congress had intended that suspension for ordinary violations of the Act or regulations, not so critical as safety emergencies, could be without hearing, it would seem that it

would have made appropriate provisions in the statute. It did not do so." (*Ibid.* 177 F.2d at Page 21)

The *Standard Airlines* case is fully dispositive of the asserted right of the Commission to issue a temporary order restraining the operations of Petitioner in the instant case. As in *Standard*, the Commission has arbitrarily determined that it can proceed to grant stays without hearing. As in *Standard*, the Commission has been unable to cite any specific statutory section creating this sanction. The Commission's blatant attempt to arrogate to itself such power should now be reversed.¹⁵

That the Commission's action violates sound and established judicial precedent is confirmed also by the Court of Appeals for the District of Columbia Circuit in its recent opinion in *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Board*, 112 U.S. App. D.C. 290; 302 F.2d 875 (1962). That case raised the issue as to whether the Federal Maritime Board could lawfully issue an order prohibiting a voluntary association of steamship companies from assessing fines or collecting fines pending Board hearing. The Board argued that this temporary order was necessary to prevent irreparable injury. Even though the

¹⁵ The Commission endeavors to ignore the full import of the *Standard Airlines* case by citing *Federal Communications Com. v. Station WJR*, 337 U.S. 265 (1949), but this case simply held that issues raised upon demurrer do not require oral argument. This is completely distinguishable from Petitioner's case where serious and complex controverted issues are involved. Other cases cited by Respondents are also totally inapposite. *Public Service Commission v. Federal Power Commission*, 117 U.S. App. D.C. 195, 327 F.2d 893 (1964), held only that the Federal Power Commission had the authority to issue temporary licenses to independent producers who were not specifically identified in the governing statute. This cited case obviously involves a grant of a privilege and not the issuance of a sanction without hearing. Compare also *R. A. Holman & Co., Inc. v. S.E.C.*, 112 U.S. App. D.C. 43; 299 F.2d 127 (1962), *cert. den.*, 370 U.S. 911, which involved only the authority of the Securities and Exchange Commission to suspend, pending a hearing, a broker-dealer's *exemption* from the need to register certain securities. Here the asserted power of the SEC had been explicitly reviewed and approved by Congress and there were claims of fraud and evident danger to the public interest.

order was issued after oral argument, the Court of Appeals, finding no specific statutory authorization for such order, set it aside, declaring:

"The power which the Board now claims is in many ways a drastic one, and in fact more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct deemed in violation of law. . . . But the Board is not a court, and cannot rely for its action on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress. See, e.g., *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 322, 81 S. Ct. 1611, 6 L. Ed. 2d 869 (1961); *United States v. Seatrain Lines*, 329 U.S. 424, 67 S. Ct. 435, 91 L. Ed. 396 (1947); *Alaska Airlines v. Civil Aeronautics Board*, 103 U.S. App. D.C. 225, 257 F.2d 229 (1958). We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency." (*Ibid.* 302 F.2d at page 880)

In fact, the procedure adopted by the Commission in the subject case is so extraordinary and novel that it would not even be available to the courts under the Federal Rules of Civil Procedure. Under the Federal Rules, no preliminary injunction shall be issued without notice to the adverse party. Notice implies a hearing. *Sims v. Greene*, 161 F.2d 87, 88-89 (3rd Cir. 1947). Even the comparatively limited remedy of a temporary restraining order must expire not later than ten days after entry (F.R.C.P. 65(b)(2)). The *ex parte* temporary restraining order, if granted, is only effective for a limited time — and a preliminary injunction will only be granted upon a hearing where both sides are present, affording the adverse party an opportunity to present evidence in his behalf. 7 *Moore's Federal Practice* Sec. 65.5.¹⁶ By contrast, the relief

¹⁶ In the absence of express authority to grant preliminary stays, an administrative agency must resort to these Court procedures. Witness the practice of

granted by the Commission is subject to no time limitations, will likely extend substantially beyond a year's duration and was granted prior to a hearing. Yet the Commission tries to defend its order by arguing that it ". . . has not ordered petitioner permanently to cease and desist from any conduct. The Commission has required only a partial and temporary halt to the expansion of their systems pending a full hearing." (Motion of Respondents for Reconsideration of Stay Orders and Opposition to Motions for Stay, filed with this Court, August 13, 1966, Page 21.)

The Commission does not explain why an unlawful cease and desist order would become lawful if it were only temporary. But in any event, how temporary is it? Petitioner respectfully points out that the Order has no limit in time and could remain in effect for years and years.

The Commission emphasized the fact that the hearing was scheduled for September 27, 1966. But the hearing has already received its first postponement to December 6, 1966.

The hearing order sets nine specific issues, and a pending petition to enlarge the issues seeks to include a number of important related questions. Thus, it is to be expected that the hearing will deal with a plethora of questions which will involve engineering and economic studies and extensive research in the fields of audience measurement, marketing, advertising, network practices, economics of UHF broadcasting, station operation, and pay-TV, plus others.

After all the parties have completed their testimony and rebuttal testimony, there will be filings of proposed findings; there will be an

the Federal Trade Commission where even in the case of false advertising of food, drugs, cosmetics and certain devices, the FTC must seek Court injunctions *Cf. Federal Trade Commission v. Dean Foods Co.*, ___ U.S. ___, 16 L.Ed.2d 802 (1966), 15 U.S.C. 45. Congress has rejected FTC efforts to secure authority to issue temporary injunctions. *House Report No. 9424 and Senate Report Nos. 3341 and 3424*, 84th Cong., 2d Sess. (1956); *House Report Nos. 49 and 1574*, 89th Cong., 1st Sess. (1965).

initial decision; and there will be subsequent filings of exceptions and requests for review at two levels within the Commission, plus petitions for reconsideration, and possible additional appeals to the Court.

On the basis of the Commission's work load and past precedents, it is conservative to estimate that the "temporary" relief would remain in effect for a period of 3 to 5 years or longer.

When pay-TV first appeared on the horizon the Commission was concerned with the question of whether pay-TV would have an adverse effect upon commercial television broadcasting, just as it is now concerned with CATV. It instituted a proceeding for the purpose of determining whether pay-TV broadcasting should be permitted and what safeguards would be needed to protect the existing broadcasting structure. Early this year the Commission invited additional comments to assist it in determining whether it should establish standards which would permit the use of over-the-air frequencies for pay-TV. It will be some years before this proceeding is concluded.¹⁷

In light of the nature of the administrative processes in general and the Commission's processes in particular, it borders on the fanciful to consider the Commission's action as "temporary". But even if such order can be construed as "temporary", it is manifest that the Commission's action is still in direct violation of the established law, as set forth above and succinctly summarized by Professor Louis L. Jaffe in his recent text as follows:

"Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decisions. Absent such statutory grant, however, it does not appear that a Federal administrative agency can issue such orders, regardless of the harm which

¹⁷ The pay-TV proceeding began February 10, 1955.

may occur pending its decision or the possible inefficacy of orders it may enter after decision." (Jaffe, *Judicial Control of Administrative Action*, page 662 (1965).)

*F. Provisions of Section 4(i) of the
Communications Act*

The Commission endeavors to avoid the clear import and effect of controlling precedent by referring to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), which reads as follows:

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

This subsection is contained in the section entitled "Provisions Relating to the Commission," which section sets forth and deals with such matters as the number and salaries of the Commissioners; the location of the principal office; the employment of staff members; the fixing of payment of overtime to staff engineers; the making of expenditures for rent, office supplies, books, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides "The Commission shall have an official seal which shall be judicially noticed." 47 U.S.C. § 154(h).

It is perfectly plain that subsection 4(i) deals with rules and regulations necessary for the conduct of the Commission's business, and was never intended as a broad grant of power to adopt the extraordinary sanction involved herein.

To hold otherwise would raise serious questions of due process under the Fifth Amendment to the Constitution. The plain fact of the matter is that the Courts, as a matter of fundamental due process, will not permit restraint on a party's property rights without the prior hearing and particularly where freedom of speech may be affected adversely. A

Quantity of Books v. Kansas, 378 U.S. 205 (1964). In the cited case, the Supreme Court ruled that a seizure order against allegedly obscene books was constitutionally deficient in not first allowing the distributors of said books an adversary hearing. Surely, if a restraint against allegedly obscene books cannot be issued without prior hearing, then *a fortiori*, the Commission's flagrant attempt to restrict the carriage of television signals and the resultant diversified programs of entertainment, news, political broadcasts, and education materials must be dismissed. Even apart from fundamental First Amendment considerations, the property rights of Petitioners must be protected under elementary principles of due process as set forth in the Fifth Amendment.

CONCLUSION

For the reasons specifically detailed in this Brief, Petitioner asks this Court to conclude that the Commission lacked statutory authority to issue a restraint of Petitioner's operations, without hearing. For all of the reasons set forth in this Brief and in the incorporated references to the Brief filed by Petitioners in Case No. 21,192, Petitioner prays that the Commission's Order be enjoined, set aside, superseded, annulled and reversed and that this Court provide such further relief as it may deem just and proper.

Respectfully submitted,

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CERTIFICATE

We certify that, in connection with the preparation of this Brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing Brief is in full compliance with those rules.

Arthur Scheiner

Gilbert B. Lessenco

APPENDIX

STATUTES AND RULES INVOLVED

Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq.

Provisions Relating to the Commission

Section 4. — (a) The Federal Communications Commission (in this Act referred to as the "Commission") shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

(b) Each member of the Commission shall be a citizen of the United States. No member of the Commission or person in its employ shall be financially interested in the manufacture or sale of radio apparatus or of apparatus for wire or radio communication; in communication by wire or radio or in radio transmission of energy; in any company furnishing services or such apparatus to any company engaged in communication by wire or radio or to any company manufacturing or selling apparatus used for communication by wire or radio; or in any company owning stocks, bonds, or other securities of any such company; nor be in the employ of or hold any official relation to any person subject to any of the provisions of this Act, nor own stocks, bonds, or other securities of any such company; nor be in the employ of or hold any official relation to any person subject to any of the provisions of this Act, nor own stocks, bonds or other securities of any corporation subject to any of the provisions of this Act. Such Commissioners shall not engage in any other business, vocation, profession or employment. Any such Commissioner serving as such after one year from the date of enactment of the Communications Act Amendments, 1952, shall not for a period of one year following the termination of his services as a Commissioner represent any person before the Commission in a pro-

fessional capacity, except that this restriction shall not apply to any Commissioner who has served the full term for which he was appointed. Not more than four members of the Commission shall be members of the same political party.

(c) The Commissioners first appointed under this Act shall continue in office for the terms of one, two, three, four, five, six and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years and until their successors are appointed and have qualified, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office; except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

(d) Each Commissioner shall receive an annual salary of \$10,000, payable in monthly installments.

(e) The principal office of the Commission shall be in the District of Columbia, where its general sessions shall be held, but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

(f) (1) The Commissioner shall have authority, subject to the provisions of the civil-service laws and the Classification Act of 1949, as amended, to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other employees as are necessary in the exercise of its functions.

(2) Without regard to the civil-service laws, but subject to the Classification Act of 1949, each Commissioner may appoint a legal as-

sistant, an engineering assistant, and a secretary, each of whom shall perform such duties as such Commissioner shall direct. In addition, the chairman of the Commission may appoint, without regard to the civil-service laws, but subject to the Classification Act of 1949, an administrative assistant who shall perform such duties as the chairman shall direct.

(3) The Commission shall fix a reasonable rate of extra compensation for overtime services of engineers in charge and radio engineers of the Field Engineering and Monitoring Bureau of the Federal Communications Commission, who may be required to remain on duty between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian or on Sundays or holidays to perform services in connection with the inspection of ship radio equipment and apparatus for the purposes of Part II of Title III of this Act or the Great Lakes agreement, on the basis of one-half day's additional pay for each 2 hours or fraction thereof at least 1 hour that the overtime exceeds beyond 5 o'clock postmeridian (but not to exceed 2-1/2 days' pay for the full period from 5 o'clock postmeridian to 8 o'clock antemeridian) and 2 additional days' pay for Sunday or holiday duty. The said extra compensation for overtime services shall be paid by the master, owner, or agent of such vessel to the local United States collector of customs or his representative, who shall deposit such collection into the Treasury of the United States to an appropriately designated receipt account: Provided, that the amounts of such collections received by the said collector of customs or his representative shall be covered into the Treasury as miscellaneous receipts; and the payments of such extra compensation to the several employees entitled thereto shall be made from the annual appropriations for salaries and expenses of the Commission: Provided further, that to the extent that the annual appropriations which are hereby authorized to be made from the general fund of the Treasury are insufficient, there are hereby authorized to be appropriated from the general fund of

the Treasury such additional amounts as may be necessary to the extent that the amounts of such receipts are in excess of the amounts appropriated: Provided, further, that such extra compensation shall be paid if such field employees have been ordered to report for duty and have so reported whether the actual inspection of the radio equipment or apparatus takes place or not: and provided further, that in those ports where customary working hours are other than those hereinabove mentioned, the Engineers in Charge are vested with authority to regulate the hours of such employees so as to agree with prevailing working hours in said ports where inspections are to be made, but nothing contained in this proviso shall be construed in any manner to alter the length of a working day for the engineers in charge and radio engineers or the overtime pay herein fixed.

(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, for printing and binding, for land for use as sites for radio monitoring stations and related facilities, including living quarters where necessary in remote areas, for the construction of such stations and facilities, and for the improvement, furnishing, equipping and repairing of such stations and facilities and of laboratories and other related facilities (including construction of minor subsidiary buildings and structures not exceeding \$25,000 in any one instance) used in connection with technical research activities), as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress. All expenditures of the Commission, including all necessary expenses for transportation incurred by the Commissioners or by their employees, under their orders, in making any investigation or upon any official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chair-

man of the Commission or by such other members or officer thereof as may be designated by the Commission for that purpose.

(h) Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed.

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No Commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

(k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain — (1) Such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy;

(2) Such information and data concerning the functioning of the Commission as will be of value to Congress in appraising the amount and character of the work and accomplishments of the Commission and the adequacy of its staff and equipment; provided, that the first and second annual reports following the date of enactment of the Communications Act Amendments, 1952, shall set forth in detail the number and

caption of pending applications requesting approval of transfer of control or assignment of a broadcasting station license, or construction permits for new broadcasting stations, or for increases in power, or for changes of frequency of existing broadcasting stations at the beginning and end of the period covered by such reports;

(3) [Repealed].

(4) An itemized statement of all funds expended during the preceding year by the Commission, of the sources of such funds, and of the authority in this Act or elsewhere under which such expenditures were made; and

(5) Specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable, including all legislative proposals submitted for approval to the Director of the Bureau of the Budget.

(1) All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of.

(m) The Commission shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof.

(n) Rates of compensation of persons appointed under this section shall be subject to the reduction applicable to officers and employees of the federal government generally.

(o) For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life

and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and co-ordination of these systems.

Section 303(m)

(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee —

(A) Has violated any provision of any Act, treaty or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) Has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) Has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language or meaning, or has knowingly transmitted —

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) Has willfully or maliciously interfered with any other radio communications or signals; or

(F) Has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for

the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

Section 312

— (a) The Commission may revoke any station license or construction permit —

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to Section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe, any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of Section 1304, 1343, or 1464 of Title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or Section 1304, 1343, or 1464 of Title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor, and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the intro-

duction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of § 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

F.C.C. Reg. § 74.1107, 31 Fed. Reg. 4572 (1966)

Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will

be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966 a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking in-

to account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. The Commission may also consider, upon the basis for the pleadings before it, whether temporary relief is called for in the public interest and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

F.C.C. Reg. § 74.1109, 31 Fed. Reg. 4572 (1966)

Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be sup-

ported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief.

Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.